IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1958

CASE No. ~~447~~ 6

DANIEL J. SENTILLES,

Petitioner,

v.

INTER-CARIBBEAN SHIPPING CORPORATION,

Respondent.

PETITIONER'S REPLY BRIEF

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No. 488

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Supreme Court of the United States

1959

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RESPONDENT'S BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INTRODUCTION

Since the purpose of a reply brief is to do precisely what the adjective implies, the Petitioner will note herein those portions of the Respondent's brief that appear to require comment.

RESPONDENT'S STATEMENT OF FACTS

It is fundamental that the party who receives a favorable jury verdict and judgment in the trial court is thereafter entitled, on appeal, to the most favorable interpretation of facts that the jury could have drawn from

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STATEMENT OF THE CASE

The History

Plaintiff sued defendant and Ben W. Lamson, and claimed, in his amended complaint, injuries and damages caused by defendants' negligence and or failure to provide a seaworthy vessel, allegedly resulting in his being "struck by seas" (R. 6). Defendants denied all allegations of negligence, unseaworthiness, proximate causation and damages (R. 10-12). Defendant Lamson moved for, and received (R. 19-20), a summary judgment—thus leaving respondent as the sole defendant below.

At a jury trial on April 8, 1957, plaintiff was awarded a verdict of $20,000 (R. 22) and final judgment for plaintiff was entered on that same date (R. 22-23). Defendant had moved for a directed verdict at the end of plaintiff's evidence (R. 200-01) and had repeated this motion at the close of all the evidence (R. 202). The trial court denied these motions (R. 201, 202), which

the evidence adduced. It is therefore interesting to note that the Respondent does not, and can not, directly attack the Petitioner's statement of facts but, instead, provides this Court with a new interpretation of the evidence, viewed in the light most favorable to the Respondent's case. We feel constrained therefore to state the obvious: *The jury trial below resulted in a verdict for the Petitioner, not for the Respondent.* The Petitioner was, and is, therefore entitled to the statement of facts provided in his Petition (pp. 5-6), which finds clear support in the evidence adduced below. To save time and space, the Petitioner simply re-avers the statement of facts above-mentioned.

RESPONDENT'S ARGUMENT

The petitioner agrees that he was required to prove that "the aggravation of his tubercular condition was probably caused by the incident on shipboard" (Opinion below, R. 216). The Respondent's brief insists (p. 6) that "(t)he most any doctor stated was that there 'could' be a connection." The Petitioner can best answer that contention by direct reference to some of the testimony below.

Dr. London, a chest specialist, testified:

* * * *

(R. 75)

"Q. Based upon your having read these depositions of these treating Doctors, the deposition of Dr. Jacobs and Dr. LeDoux, do you have an opinion, based upon the information contained therein, and the facts presented thereby, as to whether or not this man's fall aggravated his preexisting latent tubercular condition?

were both predicated upon identical grounds, including: (1) There is no evidence that the injuries complained of were in any way caused by any action or lack of action on the part of defendant; (2) There is no evidence establishing the onset of plaintiff's illness on the Ship; and (3) There is no evidence upon which reasonable men could differ on the questions of * * * [the] proximate cause of the accident and or causal relationship of the accident to the injuries so as to hold the defendant responsible. Defendant moved the Court to set aside judgment and to enter judgment in accordance with defendant's motion for directed verdict made at the close of all of the evidence, and, alternatively for a new trial (R. 23-29). The trial court denied these motions on May 7, 1957 (R. 203-04), and defendant filed its notice of appeal on May 7, 1957 (R. 203). These rulings of the trial court are set forth in the "Points on which Appellant Intends to Rely on Appeal" [Nos. 1, 2, 3] (R. 205).

The Facts

Plaintiff, a refrigeration engineer, was hired as general manager by defendant in 1950 for the primary purpose of overseeing all phases of the operation of the vessel (a banana boat) (R. 150). He signed himself on this particular voyage as chief engineer although he was not a regular crew member (R. 151). In April, 1953, Plaintiff was crossing an open deck as he returned from some repair work in a forward hold, and he was struck by seawater that came over the side of his ship in rough weather, resulting in his falling to the deck. He soon complained of a cough and did only light work until the end of the voyage, 3 or 4 days later (R. 37, 161). He then traveled from Florida to Louisiana and New York (R. 161). While in New York he saw a doctor who advised him to get immediate medical care, and the plaintiff did eventually submit to medical care in New Orleans in May, 1953—about a month after the incident on board ship.

Plaintiff's medical history showed him to be a chronic diabetic of several years standing who did not

"A. From the information that I was able to glean from the testimony, it would seem that after the fall he had a sudden worsening of his general feeling of well-being, and I would have to assume at this point that this was associated with the finding of the cavitegior region by x-ray approximately two weeks later at the time of the fall, and that these are not only related temporarily, but cause and effect. I would assume that this exposure, such as it was, to the inclement weather, and the trauma to the chest, *probably* played a role in making him feel worse at this time, and *probably* aggravated his condition."
(Emphasis supplied).

• • • •

(R. 141)

"Q. Doctor, as I understood your testimony here several minutes ago, you could not tell with any degree of reasonable medical probability whether this man's trouble was brought on acutely, as you say, by malnutrition, infection or trauma or blow. Isn't that still your testimony?

"A. Those were the various factors that could produce this type of condition.

"Q. I am asking you, isn't it your testimony that you cannot tell us which one of those was the cause with any reasonable probability, knowing the background that the man had?

"A. I believe I have already testified that I thought that the trauma to the chest was the precipitating factor."

• • • •

follow his medication closely (R. 53, 65, 87). It further revealed that he had suffered from persistent hoarseness, colds, coughs and cold sweats for 6 to 8 months prior to the accident (R. 87). These symptoms were accompanied for 3 years by a general feeling of tiredness—"malaise"—which had worsened within the year prior to the accident (R. 87). X-rays taken in 1950 showed a tubercular fibrotic infiltration in the left lung (R. 90). 1952 X-rays showed this infiltration to have increased during the two year interim (R. 90). The X-rays taken shortly after his shipboard accident revealed a progressive development of the tubercular condition (R. 94).

One of plaintiff's treating physicians stated that he knew of no case where trauma had caused TB (R. 57). Another such witness stated he did not think plaintiff's TB became active at the time of the accident, although in answers to hypothetical questions he did state that the accident "could" have aggravated an existing condition (R. 129). This doctor saw plaintiff 12 times and the accident was never mentioned by plaintiff, either in the giving of his history or otherwise (R. 124). As to what actually caused plaintiff's TB, this witness said he could not state whether the diabetic condition or the trauma caused or activated the TB (R. 126); his reasoning was that there existed no evidence that would point to one cause rather than the other (R. 126). He further stated that plaintiff's medical history showed he was susceptible to TB without trauma (R. 125).

Another of plaintiff's treating doctors said the TB had been active since approximately June, 1952 (R. 92, 99), almost one whole year prior to the accident. He further stated the pulmonary TB was a slowly developing condition (R. 99). In his opinion the X-rays of 1950, 1952 and 1953 showed the development of progressive TB (R. 94). There was no basis whatsoever, said this doctor, to state that plaintiff's condition had suddenly become worse or acute or unusual (R. 92, 93, 102).

The only doctor who testified in person at the trial was the only doctor who had never personally seen

(R. 143)

"Q. Restrict ourselves to what we know here. To what we know, what would you say are the three possibilities on this man? Would they be the three you already told us about?

"A. From the information I have gleaned from the testimony of the previous physicians that examined the patient and from the other information, I would feel that this man had an aggravation of his condition following this incident, whatever it was, that he injured his chest and that trauma produced an aggravation."

• • • •

Dr. Jacobs, a chest specialist, stated:

• • • •

(R. 129)

"Q. You have stated that the blow of the chest and diabetes, in your opinion, in this case were both contributing causes to the activation or aggravation of the preexisting, dormant condition, is that correct?

"A. Yes, sir."

• • • •

The Petitioner and Respondent are agreed as to the law which applies to the facts herein. Their divergence of opinion arises in *applying* the law to the facts. The Petitioner simply contends that the jury was entitled to believe the foregoing excerpted testimony, and that such testimony

plaintiff—Dr. London. In answer to hypothetical questions he stated that plaintiff's TB could have been caused by either (1) Diabetes or (2) Malnutrition or (3) Trauma (R. 136, 137, 142, 143, 145): he stated several times that there was no way for him to venture an opinion as to which of these 3 factors caused or contributed to plaintiff's condition (R. 136, 137, 142, 143, 145). He admitted that plaintiff's prior medical history contained many symptoms consonant with the development of TB (R. 130-31, 133) and that the "night sweats" which plaintiff had suffered the prior 6-8 months were a "prominent" TB symptom (R. 140) of active TB.

All of the above evidence was placed before the court in the plaintiff's case.

The hospital records bear out the history and the diagnoses as stated by the treating doctors (DX-1).

The United States Court of Appeals for the Fifth Circuit had the case before it on briefs and oral arguments. On June 9, 1958, that court reversed the trial court and ordered the entry of judgment for respondents. (See Appendix in the Petition; also R. 211-217.) Petition for rehearing was denied.

ARGUMENT

The question before the Court of Appeals was whether plaintiff must prove a causal connection between the accident and the illness, or may he merely show the accident and then receive a jury verdict even though his own evidence shows absolutely **no reasonable medical probability** that the incident caused the injury. In fact, here plaintiff is asking for a verdict even though his evidence affirmatively proves that his illness had existed long prior to the accident and had not shown any sudden or recent developments since the voyage.

is clearly not conjectural nor speculative, but meets the "probability" test outlined by the Respondent.

RESPONDENT'S REASONS FOR DENYING THE WRIT

The Respondent tells us that "the decision below is of no importance whatsoever beyond the facts of the particular case." (p.6). This is clearly not so. As already stated in the Petition (pp. 7-8), the decision below clearly discards the probability test it attempts to endorse. The Opinion clearly required the Petitioner to prove not only that his fall *probably* aggravated his tubercular condition, but also that *no other factor could possibly have had the same result*. Thus, the decision below does violence to all the federal cases it cites, and, indeed, to all federal cases which correctly hold that medical testimony must be confined to probabilities, but does not require absolute certainty.

On this ground alone, the instant case is subject to review under Rule 19 of this Court.

Certiorari should lie herein for another important reason, stated by this Court in *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 509, 77 S.Ct. 443, 450, 1 L.Ed.2d 493. Although the *Rogers* decision arose from an F.E.L.A. case, the following quotation would be just as apt in a case under the Jones Act, as here:

> "Cognizant of the duty to effectuate the intention of the Congress to secure the right to a jury determination, this Court is vigilant to exercise its power of review in any case where it appears that the liti-

The law on proof of medical causation is well recognized by the courts and the annotators, as well as by the text writers.

A recent decision by the Court of Appeals for the Eighth Circuit succintly puts it thusly:

> "The great weight of authority supports the rule that **medical expert testimony to be sufficient to take the case to the jury must be to the effect that the accident or injury probably caused the Insured's death**; and that testimony to the effect that a causal connection between the accident or injury and Insured's ensuing death was possible, such as testimony that the accident or injury 'might have,' or 'may have,' or 'could have' caused the death of Insured, is insufficient to take the case to the jury, because such testimony leaves the issue in the field of conjecture and permits the jury to speculate or guess as to the cause of death." *Chicago, G. W. Ry.* v. *Smith*, 228 F. 2d 180, 182 (8th Circ. 1955).

The annotation in 135 ALR 516, states, at P. 157:

> "It appears to be well settled that medical testimony as to the possibility of a causal relation between a given accident or injury and the subsequent death or impaired physical or mental condition of the person injured is not sufficient, standing alone, to establish such relation. By testimony as to possibility is meant testimony in which the witness asserts that the accident or injury 'might have,' 'may have,' or 'could have' caused, or 'possibly did' cause the subsequent physical condition or death or that a given physical condition (or death) 'might have,' 'may have,' or 'could have' resulted or 'possibly did' result from a previous accident or injury * * * testimony, that is, which is confined to words indicating the possibility or chance of the existence of the causal relation in question and does not include words indicating the probability or likelihood of its existence, see as supporting the foregoing propositions, the following decisions."

[1] All emphasis in quoted portions of brief is supplied unless otherwise noted.

gants have been improperly deprived of that determination. Some say the Act has shortcomings and would prefer a workmen's compensation scheme. The fact that Congress has not seen fit to substitute that scheme cannot relieve this Court of its obligation to effectuate the present Congressional intention by granting certiorari to correct instances of improper administration of the Act and to prevent its erosion by narrow and niggardly construction.

* * * *

". . . Special and important reasons for the grant of certiorari in these cases are certainly present when lower federal and state courts persistently deprive litigants of their right to a jury determination."

CONCLUSION

In its consideration of Dr. London's testimony the Circuit Court of Appeals ignored the very evidentiary test it annotated so well.

In its consideration of Dr. Jacobs' testimony the Circuit Court of Appeals overlooked or ignored that portion which was favorable to the jury verdict, *supra*, p. /

In reversing the trial court's judgment for Petitioner, and entering judgment for the Respondent instead, the Circuit Court of Appeals overlooked or ignored the fact that *some* of the Petitioner's injuries were *undisputedly* caused by the accident (Petition, p.13).

The foregoing establishes that the opinion below is inimical to all federal law which upholds the "probability"

The law being clear, there remains only the application of the legal principles to the facts: the entire medical evidence offered by plaintiff is speculative and conjectural regarding the attempted linking of the trauma to the illness. The most any doctor stated was that there "could" be a connection. Indeed, practically every doctor stated as much when answering plaintiff's counsel's futile attempts to establish proximate causation. Further, most, if not all, of plaintiff's counsel's questions were couched in terms of "can" or "could there be" a connection (e.g., R. 94-95).

Dr. Jacob's (R. 103-130) testimony in this regard is permeated with qualifications such as "could," "could very well be," "can," "could have," "likelihood," "possibility." Then he states that he can't say which caused the TB—Diabetes or Trauma—and that either would be sufficient (R. 126). He "doubts" that plaintiff contracted TB on the ship (R. 129) and when pressed by the speculative question "could it" have been, the doctor unequivocally answered "I don't think so." (R. 129).

Dr. Ledoux considered plaintiff's case to have been active for 10 months prior to the voyage (R. 98). He was too generous with his admissions of possibilities: the trauma "could" have aggravated or expedited a previously existing condition (R. 94, 95, 99, 102). Answering erroneously predicated hypothetical questions, he stated the occurrences on ship were "quite apt" and "may be" causes of acute dissemination of TB germs (R. 95), but he definitely stated there was not acute or unusual development of plaintiff's condition (R. 100, 102). He saw plaintiff over twenty times. (R. 89).

REASONS FOR DENYING THE WRIT

Respondent respectfully submits that this petition should be denied for the following reasons:

1. The decision below is of no importance whatsoever beyond the facts of the particular case.

2. The questions before it were correctly decided by the Court of Appeals.

3. The questions presented for review are nothing more than an attempt to obtain for petitioner still another complete evaluation of all the medical evidence in the case.

4. None of the questions presented for review are within the scope of Rule 19 of this court nor are they within this court's interpretation of its "sound judicial discretion" pertaining to the granting of writs of certiorari. See *Rice* v. *Sioux City Cemetery*, 349 U. S. 70. 75 S. C. 614, 99 Law Ed. 897 (1955).

CONCLUSION

Plaintiff recovered $20,000 from a sympathetic jury for a tubercular condition that had been active at least 10 months prior to the alleged cause of the illness. His own evidence showed that he had been progressively "symptomatic" of TB for several years. His evidence linking the accident to the illness not only was speculative to the point of being totally without weight, but it went even further and affirmatively proved by substantial and definite evidence that he had not received any injury as a result of the accident. Plaintiff's own case showed that the defendant was not liable to him. The trial court should have ruled in accordance with the defendant's trial and post trial motions, but it having failed to do so, the Court of Appeals had no alternative but to reverse the judgment.

The respondent respectfully submits that the petition should be denied.

Respectfully submitted.

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test for expert testimony, and a prima facie deprivation of the right to jury trial guaranteed the Petitioner by the Constitution, the Jones Act, and the decisions of this Court.

WHEREFORE, this Court is respectfully requested to grant a writ of certiorari herein.

Respectfully submitted

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